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In the Supreme Court of the United States

OCTOBER TERM, 1978

ELVIA ESCAMILLA MORENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below erred in concluding that the search of petitioner was conducted at a "functional equivalent of the border." She also contends that the evidence was insufficient to support her conviction.

1. After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). She was sentenced to four years' imprisonment, to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 22-24; 579 F. 2d 371).

The evidence at trial showed that petitioner was stopped by a Border Patrol agent at a permanent checkpoint located 14 miles south of Sarita, Texas, on U.S. Highway 77, a major highway leading north from the Lower Rio Grande Valley (Pet. App. 22, 50; Tr. 22).

The agent noticed that petitioner and her passenger appeared nervous, and asked them to proceed to a secondary inspection area. The agent then observed a flange with a screw on both sides of the rear bumper of petitioner's truck, and, upon looking underneath the truck, he saw two hinges directly behind the bumper, some indications of welding, and a compartment under the bed of the truck (*ibid.*). He had previously seen similar compartments used to transport marijuana through the checkpoint (Tr. 28). After lifting the bed of the truck, the agent discovered 189 pounds of marijuana (Pet. App. 22). A DEA agent testified at trial that petitioner told him she had been paid $200 to drive the truck to Houston (*ibid.*).

2. Petitioner contends (Pet. 8-13) that the Sarita checkpoint is not located at a "functional equivalent of the border" and that therefore the Border Patrol agent was not authorized to search the truck compartment in which the marijuana was found. However, the factual determination by both lower courts that the Sarita checkpoint is the functional equivalent of the border does not warrant further review by this Court. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).[1]

Petitioner also argues (Pet. 10-13) that the decision here conflicts with decisions of the Ninth and Tenth Circuits that immigration checkpoints located away from true borders cannot be the functional equivalent of the border (see Pet. 12). But neither circuit has made any such categorical ruling. Instead, the Ninth Circuit has indicated that a checkpoint located away from the border can be

[1]The district court took "judicial notice of the location, justification and other physical aspects" of the Sarita checkpoint, as it had determined them in other criminal proceedings (Pet. App. 25, referring to Pet App. 27-55). See Fed. R. Evid. 201. On appeal, the court of appeals relied (Pet. App. 23) on its prior determination in *United States* v. *Reyna,* 572 F. 2d 515, 517-518 (5th Cir. 1978), that the Sarita checkpoint is the functional equivalent of the border.

the functional equivalent of the border provided that it is not at a place where "[a] significant number of those stopped are domestic travelers." *United States* v. *Bowen,* 500 F. 2d 960, 965-967 (9th Cir. 1974), aff'd, 422 U.S. 916 (1975).[2] This standard is substantially the same as the Fifth Circuit's rule that a checkpoint may be the functional equivalent of the border if, among other criteria, "the percentage of domestic traffic" does not "approach[ ] a majority." *United States* v. *Alvarez-Gonzalez,* 542 F. 2d 226, 229 (5th Cir. 1976).[3]

The difference in result in this case and in *Bowen* is attributable to the differing characteristics of the checkpoints, not to disagreements in principle. In *Bowen,* the Ninth Circuit "had no reason to believe that virtually all or even most of the cars passing through" the checkpoint had crossed the border (500 F. 2d at 966), while here the court held that the percentage of domestic travel at Sarita does not "approach the majority" (Pet. App. 23, citing *United States* v. *Reyna,* 572 F. 2d 515, 517 (5th Cir. 1978)).[4]

[2]The Tenth Circuit decisions cited by petitioner (Pet. 11-12) (*United States* v. *Maddox,* 485 F. 2d 361 (1973) and *United States* v. *King,* 485 F. 2d 353 (1973)) do not attempt to define the functional equivalent of a border search. The court simply remanded these cases for a determination of whether the checkpoint at Truth or Consequences, New Mexico, 98 miles from the border, was such an equivalent.

[3]Petitioner also relies (Pet. 10, 12) on *United States* v. *Escalante,* 554 F. 2d 970 (9th Cir. 1977) and *United States* v. *Juarez-Rodriguez,* 568 F. 2d 120 (9th Cir. 1977) to demonstrate a conflict with this case. But those decisions did not find it necessary discuss whether the San Clemente checkpoint at issue there was the functional equivalent of the border, since that issue had already been conceded by the government in *United States* v. *Ortiz,* 422 U.S. 891, 892 (1975).

[4]Contrary to petitioner's claim (Pet. 12-13), *Reyna,* on which the court below relied, explicitly followed prior Fifth Circuit precedent (*United States* v. *Alvarez-Gonzalez, supra)* in deciding whether Sarita is the functional equivalent of the border. See 572 F. 2d at 517.

3. Petitioner contends (Pet. 14-16) that the evidence was insufficient to show that she possessed the marijuana found in the truck. But the government's evidence showed not just that she was driving the car and that the marijuana was secreted in the body of the car, rather than in a passenger's belongings over which she might have limited control, but also that she admitted to receiving $200 to drive the truck. As the court below held, "the jury was justified in disbelieving [petitioner's] claim of ignorance * * *. Any conflicts in the evidence must be resolved in favor of the jury verdict" (Pet. App. 24).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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